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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF BAKERSFIELD,

Plaintiff and Appellant,

v.

WEST PARK HOME OWNERS  
ASSOCIATION AND FRIENDS,

Defendant and Respondent.

F075834

(Super. Ct. No. CV280593)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Kutak Rock, Neil L. Arney and Mia K. Della Cava for Plaintiff and Appellant.

Brumfield & Hagan, Robert H. Brumfield, Kristin A. Hagan and Joseph A.

Werner for Defendant and Respondent.

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West Park Home Owners Association and Friends (West Park) opposed an action filed by the City of Bakersfield (City) to validate its plan for financing road improvement projects. The superior court validated the plan in its entirety. We affirmed the judgment in part and reversed in part. (*City of Bakersfield v. West Park Home Owners Assn. & Friends* (2016) 4 Cal.App.5th 1199, 1202 (*West Park I*)). The reversal related to the

plan's proposed use of gas tax revenues, which we concluded was unconstitutional. The validation of the remainder of the plan was affirmed.

After West Park achieved this partial reversal on appeal, it moved for attorney fees pursuant to Code of Civil Procedure section 1021.5 (section 1021.5). The superior court granted the motion, awarding \$163,136 in fees based on the lodestar figure (i.e., hours reasonably expended times reasonable rates) requested by West Park and a multiplier of 1.5.

City appealed the award, contending West Park was not a successful party and West Park failed to prove the "financial burden of private enforcement" for West Park justified an award of attorney fees under section 1021.5. Alternatively, City argues the superior court abused its discretion in determining the amount of the award because (1) the claimed fees should be reduced to reflect West Park's limited success, (2) a multiplier should not be applied where (a) there is no contingency fee agreement and (b) the expense will be borne by City's taxpayers, and (3) the block billing used by West Park's attorneys failed to establish the reasonableness of the hours claimed.

Appellate courts apply an abuse of discretion standard of review to a superior court's decision to award attorney fees under section 1021.5. When applying this standard, we first consider whether the superior court applied the correct legal principles that define when the statutory elements have been met. If the superior court applied the appropriate legal principles, we next consider whether the result was within the range of the court's discretion—that is, whether there was a reasonable basis for the decision. Here, City has not established that the court applied the wrong legal principles in determining (1) West Park was a successful party, (2) the financial burden of private enforcement by West Park justified an award, and (3) the reasonable rates, reasonable hours and application of a multiplier. Furthermore, City has not established that the various determinations were outside the range of the superior court's discretion—that is, there was no reasonable basis for the determinations.

We therefore affirm the order awarding attorney fees.

## **FACTS**

West Park is a California corporation. West Park does not dispute that its purpose includes, but is not limited to, “[t]he preservation of the Westpark neighborhood and nearby surrounding areas and prevention of the destruction and/or endangerment of the neighborhood and surrounding areas.”

The record contains little admissible evidence about West Park, its management, the individuals who might benefit from its activities, and the nature of those benefits. Some information on these subjects is available in the administrative record, which contains documents related to meetings of the Bakersfield City Council. The minutes of the City Council’s February 13, 2013, meeting state “Tim Stonelake, on behalf of the Westpark Homeowners Association,” spoke “in opposition to Alignment B through the Westpark neighborhood.” The July 17, 2013, minutes identify Amy Richardson as the chairman of West Park and state she spoke in opposition to the Centennial Corridor project. The speaker’s card Richardson submitted prior to the meeting identified the subject of her comments as “58 extension.” The April 17, 2013, minutes state “Amy Richardson spoke in opposition to the Highway 58 Route B extension, explaining that there will be ramp closures causing traffic congestion in neighborhoods and *loss of business*; and she asked that the City Council not fund this project.” (Italics added.) The terms “Alignment B,” the “Route B extension” and “Alternative B” are labels applied to one of the options for connecting State Route 58 and Westside Parkway. Alternative B goes through the Westpark neighborhood and was recommended by the California Department of Transportation (Caltrans).

### Construction Projects

Connecting State Route 58 with Westside Parkway is a component or segment of the project referred to as the Centennial Corridor, which is one of several road improvement projects referred to as the Thomas Roads Improvement Program (TRIP).

TRIP is a cooperative effort among City, the County of Kern, Caltrans, and the Kern Council of Governments with the stated purpose of undertaking projects to relieve traffic congestion and the stress on outdated infrastructure. The program bears the name of Congressman Bill Thomas because he was instrumental in the enactment of federal legislation authorizing significant federal funding for specific projects located in Kern County. The estimated total cost of the projects included in TRIP is \$1.3 billion. Federal funding would provide approximately \$626 million of this cost and state funds would bring the total to \$820 million.

A March 5, 2014, update of TRIP presented to the City Council refers to the “Centennial Corridor—SR-58 Connector” and shows the location of Alternative B of the connector relative to State Route 58 and Westside Parkway on an aerial photograph.<sup>1</sup> Other information about the impact of Alternative B is provided in an August 20, 2013, memorandum from City’s finance director addressing right-of-way costs. The total cost related to the necessary rights of way for Alternative B is projected at \$194.2 million and involves a total of 422 acquisitions. The acquisitions include 33 partial acquisitions and 199 full acquisitions of single family residences, and 15 partial acquisitions and 36 full acquisitions of commercial or industrial parcels.

#### Financing Plan

To obtain the funds needed to pay its share of the cost of the various TRIP projects, City proposed forming a nonprofit public benefit corporation as a separate entity and having that corporation sell long-term certificates (i.e., bonds<sup>2</sup>) to raise funds. In

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<sup>1</sup> The update states the connector “improves regional connectivity and supports transcontinental goods movement” and shows how the Centennial Corridor from Bakersfield to Interstate 5 is part of a route from San Francisco to Wilmington, North Carolina on the Atlantic coast.

<sup>2</sup> We determined the certificates met the definition of “bonds” and concluded the title given to the instruments by City was not determinative because a title does not change the nature of the instrument. (*West Park I, supra*, 4 Cal.App.5th at p. 1211.)

exchange for those funds, City would promise to make installment payments to the corporation. The corporation would use the funds from City's installment payments to make the periodic payments of principal and interest owed under the terms of the certificates. To ensure City would make its installment payments and, thus, the corporation would have funds available to repay the certificate holders, City would "irrevocably pledge (1) the gas tax revenues received and deposited in the gas tax fund; (2) the transportation impact fee revenues received and deposited in the transportation impact fee trust fund; and (3) the restricted utility franchise and surcharge revenues received and deposited in the roads program utility franchise fee and surcharge fund." (*West Park I, supra*, 4 Cal.App.5th at p. 1203.)

In July 2013, the City Council adopted a resolution authorizing the formation of the Bakersfield Public Benefit Corporation, the entity that would issue the certificates. (*West Park I, supra*, 4 Cal.App.5th at pp. 1202–1203.) In September 2013, the City Council passed a resolution authorizing City to enter into various agreements needed to implement the financing plan. (*Id.* at p. 1203.)

### **PROCEEDINGS**

In October 2013, to assure the marketability of the certificates, City filed a complaint under Government Code section 53511 et seq. and Code of Civil Procedure section 860 et seq. to validate the financing plan. In January 2014, West Park appeared as an interested party and answered the complaint. Its answer included a general denial, various affirmative defenses, and a request for a "judgment that [City] take nothing by reason of the Complaint on file herein." One affirmative defense asserted that implementing the proposal would cause City to incur a debt obligation prohibited by section 18 of article XVI of the California Constitution. Another asserted the California Constitution required the anticipated debt obligation to be approved by two-thirds of the voters.

West Park's opening brief in the validation action presented three main arguments. First, West Park contended City's proposed installment payments to the public benefit corporation constituted indebtedness that triggered the voter approval requirements set forth in the California Constitution. Second, West Park contended the proposed pledge of gas tax revenues to make the installment payments was improper under Streets and Highways Code section 2107.4 and section 2 of article XIX of the California Constitution. Third, West Park argued the complete unity of identity between City and the public benefit corporation made the corporation's issuance of certificates subject to City's constitutional debt limitations. West Park argued the certificates, if issued, would unlawfully exceed that limitation.

In December 2014, the trial court issued a written tentative decision in favor of City. West Park requested a statement of decision and then filed objections to that statement. In May 2015, the court issued a final statement of decision and entered judgment in favor of City. The judgment stated the Bakersfield Public Benefit Corporation was validly and legally formed and City was entitled to use the corporation to finance or refinance street and highway projects. The judgment also stated City had full power and authority to finance or refinance street and highway projects in the manner proposed by its financing plan. In July 2015, West Park appealed.

In October 2016, we concluded the overall financing plan was valid, but agreed with West Park's second argument that City could not use gas tax revenues as part of the financing. (*West Park I, supra*, 4 Cal.App.5th at p. 1202.) Our disposition stated: "The portion of the judgment validating the use of the state gas tax revenues to make payments on the certificates is reversed. The remainder of the judgment is affirmed. The parties shall bear their own costs on appeal." (*Id.* at p. 1213.)

#### Attorney Fees Motion

After remittitur, West Park filed a motion for attorney fees pursuant to section 1021.5. The motion asserted West Park's attorneys had expended 357.8 hours on the

litigation prior to the attorney fees motion, applied hourly rates from \$225 to \$300 to those hours, and calculated a lodestar figure of \$98,867.50. The motion requested a multiplier of 1.5 based on (1) the novelty and difficulty of the questions involved, (2) attorney skill, (3) delays and risks of nonpayment of the fees incurred, and (4) the success achieved. The motion was supported by three declarations from attorneys who worked on the case. The declarations primarily addressed the time spent on the case, timekeeping practices, hourly rates and the invoices sent to West Park. The declarations provided no information about West Park, its founders or its supporters.

Invoices attached to one of the supporting declarations showed that the law firm had been paid approximately \$41,000 through September 2014 and the account was current as of that month. Subsequent payments were few. The last invoice attached to the declaration was dated October 1, 2016, and reflected the attorney time spent preparing for and arguing the appeal before this court. It showed West Park owed an outstanding balance of \$56,049.37.

City's opposition to the motion for attorney fees argued West Park was not the successful party for purposes of section 1021.5 and West Park had not met its burden of showing its lack of a financial interest or stake in the litigation. City also challenged the amount of fees requested, arguing (1) the application of a multiplier was inappropriate and (2) the lodestar figure should be reduced by 75 percent to reflect the limited results achieved. City's opposition was supported by affidavits from (1) City's finance director explaining the impact of our decision declaring the proposed use of gas tax revenues unconstitutional and (2) the attorney who represented City in the validation action. The attorney's affidavit included copies of documents filed in this court or the trial court. The attorney's affidavit also stated it included as exhibits true and correct copies of (1) West Park's articles of incorporation; (2) "a screen shot showing that [West Park] sought donations to fund this litigation"; and (3) screen shots of West Park's Facebook page.

On April 27, 2017, the trial court heard arguments on the motion. At the hearing, counsel for City attempted to present copies of news articles that had not been attached to his earlier affidavit. Counsel argued the news articles suggested the objective of West Park “was to prevent the project and not to simply invalidate the financing of the project.” Noting that opposing counsel had not seen the new materials, the court continued the hearing until May 12, 2017, and gave West Park an opportunity to present evidentiary objections and address whether the materials were relevant to the financial burden element of section 1021.5.

Prior to the May 12, 2017, hearing, the parties filed sur-replies and City submitted a second attorney affidavit that included copies of four news articles addressing the Centennial Corridor project and opposition to it. A few days after the hearing, the court issued its decision to award attorney fees in the amount of \$163,136. (See pt. II.B.3., *post.*) City filed a timely notice of appeal.

## **DISCUSSION**

### **I. GENERAL PRINCIPLES**

#### **A. Overview of Section 1021.5**

##### ***1. Elements***

Section 1021.5 sets forth California’s private attorney general doctrine by providing in relevant part:

“Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”



Courts and commentators have divided this statutory text in various ways. To assist counsel in organizing evidence and arguments relevant to a statutory fee award, we have identified six separate elements. “A superior court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest if (3) a significant benefit has been conferred on the general public or a large class of persons, (4) private enforcement is necessary because no public entity or official pursued enforcement or litigation, (5) the financial burden of private enforcement is such as to make a fee award appropriate, and (6) in the interests of justice the fees should not be paid out of the recovery.” (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 390, fn. omitted (*Robinson*); cf. *Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1026–1027 [three statutory factors].) The trial court must realistically assess the litigation and determine from a practical perspective whether the statutory elements have been met. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.)

Here, the moving party was not required to address the last element because there was no recovery of money. Consequently, the validity of the trial court’s award of attorney fees depends on whether the other five elements were established. (See *Robinson, supra*, 202 Cal.App.4th at pp. 390–391; *County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648.) Stated another way, if City shows that one of the elements was not established, the attorney fees award must be reversed.

## 2. *Burden of Proof*

The burden of proving the existence of each statutory element is placed on the party requesting attorney fees under section 1021.5. (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044; see Evid. Code, §§ 500 [burden of proof], 550 [burden of producing evidence].) This general rule allocating the burden of proof

applies to the financial burden element. (E.g., *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 777; *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.)

B. Standard of Review

The standard of review normally applied to a superior court's ruling on a motion for attorney fees under section 1021.5 is abuse of discretion. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213 (*Whitley*).) De novo review, however, “““is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.””” (*Ibid.*; *McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610, 623 [“Where the material facts are undisputed, and the question is how to apply statutory language to a given factual and procedural context, the reviewing court applies a de novo standard of review to the legal determinations made by the trial court”].)

In *Robinson*, we stated that, in certain situations, a two-step approach is useful in determining whether the trial court abused its discretion. (*Robinson, supra*, 202 Cal.App.4th at p. 391.) “First, the appellate court considers whether the superior court applied the proper legal standards in reaching its determination.” (*Ibid.*) If the wrong legal standards were applied, the trial court abused its discretion. (*Ibid.*) When undertaking this step, “an appellate court must pay particular attention to the superior court’s stated reasons” for awarding or denying fees. (*Ibid.*) If the proper legal standards were applied, the appellate court proceeds to the second step and “determines whether the result was within the range of the superior court’s discretion—that is, whether there was a reasonable basis for the decision.” (*Ibid.*) This inquiry into the reasonableness of the decision includes an examination of the evidentiary support for the statutory elements.

Here, City notes the minute order stated the trial court found West Park was the prevailing party, did not mention the other elements of section 1021.5, and made no

specific findings of fact relating to those elements. Trial courts deciding a motion for attorney fees under section 1021.5 are not required, statutorily or otherwise, to issue a written decision explaining the factual and legal basis for awarding or denying fees. (Cf. Code Civ. Proc., § 632 [statement of decision after a court trial].) As a result, such an order is subject to the general rule that appellate courts indulge all intendments and presumptions to support the order on matters as to which the record is silent. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140; *Heron Bay Homeowners Assn. v. City of San Leandro* (2018) 19 Cal.App.5th 376, 389 [implied findings on the financial burden element].) Accordingly, we indulge all reasonable intendments and presumptions in support of the decision awarding West Park attorney fees under section 1021.5.

## II. APPLICATION OF STATUTORY ELEMENTS

City opposed the motion for attorney fees by arguing two elements were absent. First, City contended Westpark was not the successful party for purposes of section 1021.5. Second, City argued Westpark had not met its burden of showing that its litigation costs exceeded its financial incentives to pursue the litigation.

### A. Successful Party

#### 1. *Application of Legal Standard for Success*

Success is determined by the impact of the action. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 566.) It is well settled that partially successful plaintiffs may recover attorney fees under section 1021.5. (E.g. *City of Oakland v. Oakland Police and Fire Retirement System* (2018) 29 Cal.App.5th 688, 708; *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1345 (*Lyons*).) Plaintiffs may be considered successful if they succeed on *any* significant issue in dispute that achieves *some* of the benefit they sought in bringing the lawsuit. (*Lyons, supra*, at p. 1346.) This principle is equally applicable to defendants who appear in a validation action. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1305 [defendant in city's validation action met

requirements of § 1021.5; order denying attorney fees reversed]; see *Adoption of Joshua S.* (2008) 42 Cal.4th 945, 957 [“attorney fees have been awarded to those defending against suits by public entities”].) Therefore, we conclude a defendant is a successful party for purposes of section 1021.5 if it succeeds on any significant issue in dispute and, as a result, achieves some of the benefits sought in opposing the validation action. (See generally, 1 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2018) §§ 2.72, 3.19, pp. 2-59, 3-19 to 3-21 [defendants as a successful party under § 1021.5].)

## 2. *Outcome of the Litigation*

Here, the trial court rejected West Park’s challenges to the validation of City’s financing plan. Its judgment validated all aspects of the plan. In short, West Park lost in the trial court and its success in the litigation is determined by the impact of this court’s partial reversal of the trial court’s judgment.

We agreed with West Park’s contention that “City’s use of gas tax revenues violates article XIX, section 6 [of the California Constitution] and Streets and Highways Code section 2107.4 in that the City is using gas tax revenues on non-voter approved financing.” (*West Park I, supra*, 4 Cal.App.5th at pp. 1209, 1211.) We reversed “[t]he portion of the judgment validating the use of the state gas tax revenues to make payments on the certificates.” (*Id.* at p. 1213.) West Park’s other claims of trial court error were rejected and we affirmed the remainder of the judgment. (*Ibid.*)

Our reversal effected paragraph 7.b of the judgment, which stated: “The City’s pledge and use of Gas Tax Revenues to make Installment Sale Payments to finance or refinance street and highway projects are not prohibited by California Constitution Article XIX, Sections 2 or 6.” In addition, it effected paragraph 12 of the judgment, which stated in part: “This Judgment also binds and permanently enjoins and restrains all Defendants from the institution of any action or proceeding challenging the City’s pledge and use of the Gas Tax Revenues, the Transportation Impact Fee Revenues, and the

Restricted Utility Franchise and Surcharge Revenues for purposes of making the Installment Sale Payments.” (Italics added.)

The volume of the gas tax revenues impacted is demonstrated by materials presented at a February 13, 2013, workshop about funding sources for the TRIP projects. The materials estimated that for the fiscal year 2012-2013, at total of about \$21.2 million would be available from three sources—gas tax revenues (\$6 million), transportation development fees (\$10.6 million) and utility surcharge fees (approximately \$4.6 million). By these estimates, gas tax revenues would be the source of slightly less than 30 percent of the available funding. This percentage for a single year is similar a figure derived from multiple years. The February 2017 affidavit of City’s finance director states gas tax revenues constituted 30.8 percent of the revenues from the three sources during the six years preceding the declaration. West Park notes that other materials in the administrative record indicate that gas tax revenues would have provided approximately 50 percent of the total funding pledged to support repayment of the certificates. Based on the 30 percent figure and City needing to borrow approximately \$240 million, the trial court reasonably could have found that our decision prevented the unconstitutional use of approximately \$72 million in pledged gas tax revenues.

The affidavit of City’s finance director addressed the impact of our decision on both the TRIP projects and the financing of those projects. He stated the decision does not prevent City from proceeding with the TRIP projects or from financing the projects pursuant to the financing plan by pledging and using transportation impact fee revenues and restricted utility franchise and surcharge revenues. He also stated City has the right to use gas tax revenues to pay project costs on a pay-as-you-go basis. The finance director expressed City’s intent to proceed with (1) the projects, (2) the financing plan as modified by our decision, and (3) the use of gas tax revenues to pay costs associated with the projects on a pay-as-you-go basis. The finance director’s affidavit supports a finding

of fact that the way City used gas tax revenues changed as a result of our decision invalidating part of the financing plan.

3. *Application of Abuse of Discretion Standard*

Our analysis of whether the trial court abused its discretion by determining West Park was a successful party begins with whether the trial court applied the correct legal principles. We have located nothing in the record tending to show, either directly or by inference, the trial court used the wrong legal standards for determining success. Accordingly, we proceed to the second step and address whether there is a reasonable basis for the trial court's determination that West Park was a successful party. (See *Robinson, supra*, 202 Cal.App.4th at p. 391.)

Here, West Park won a disputed, significant issue about the statutory and constitutional limitations placed on the use of gas tax revenues. The opening brief West Park filed in the trial court demonstrates enforcement of these limitations was one of the results West Park sought to achieve by opposing City's validation action. In addition, West Park secured a published opinion addressing a constitutional limitation, which is a factor the trial court could give some weight in considering whether West Park was successful. (See generally, *Gonzales v. Santa Clara County Dept. of Social Services* (2017) 9 Cal.App.5th 162, 175 [securing published appellate decision]; *Protect Our Water v. County of Merced* (2005) 130 Cal.App.4th 488, 495–496 [published decision supported finding of significant public benefit in the outcome of the litigation].) In light of the tens of millions in gas tax revenues that would have been handled in an unconstitutional manner and the other circumstances of this case, we conclude the trial court had a reasonable basis for determining West Park was a successful party. (See *Lyons, supra*, 136 Cal.App.4th at p. 1346.) The fact that West Park's success was partial does not override these factors and compel a conclusion that West Park was unsuccessful.

(See *ibid.*) Consequently, the trial court did not abuse its discretion when it determined West Park satisfied the success requirement of section 1021.5.

B. Financial Burden of Private Enforcement

1. *Legal Principles*

In *Whitley, supra*, 50 Cal.4th 1206, our Supreme Court addressed in detail how the “financial burden of private enforcement” element should be analyzed. The court acknowledged the general principle adopted in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, that an award of attorney fees is appropriate when the cost of the claimant’s legal victory transcends his or her personal interest and places a burden on the claimant out of portion to his or her individual stake in the matter. (*Whitley, supra*, at p. 1215.) The court noted earlier decisions “have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield.” (*Ibid.*)

In short, our Supreme Court adopted a cost-benefit analysis for evaluating the “financial burden of private enforcement element of section 1021.5.” (*Whitley, supra*, 50 Cal.4th at p. 1215.) The court illustrated the specific method for weighing costs and benefits by quoting extensively from *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, at pages 9 through 10. (*Whitley, supra*, at pp. 1215–1216.)

The benefits side of the equation contains two components, which are multiplied by one another. The first component is the monetary value of the gains actually attained by the successful party or that reasonably could have been expected. (*Whitley, supra*, 50 Cal.4th at p. 1215.) The second component is an estimate of “the probability of success at the time the vital litigation decisions were made ....” (*Ibid.*) The monetary value of the benefits constituting the first component is discounted by the estimated probability of success, which produces an estimated value of the case at the time the vital litigation

decisions were being made. This discounted monetary value represents the benefit side in the cost-benefit comparison. (*Ibid.*)

The costs side of the cost-benefit analysis is based on the actual costs of the litigation, which include attorney fees, deposition costs, expert witness fees, and other expenses required to bring the case to fruition. (*Whitley, supra*, 50 Cal.4th at pp. 1215–1216.)

The final step in the cost-benefit analysis is to compare the estimated monetary value of the case to the actual cost and make a value judgment whether it is desirable to encourage litigation of that sort by providing a bounty. (*Whitley, supra*, 50 Cal.4th at p. 1216.) A bounty in the form of an award of attorney fees is “‘appropriate except where the expected value of the litigant’s own monetary reward exceeds by a substantial margin the actual litigation costs.’ [Citation.]” (*Ibid.*; *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1193.)

## 2. *West Park’s Motion*

West Park’s motion for attorney fees began its discussion of the financial burden element by setting forth some general principles and stating: “Essentially, the court must evaluate the value of the case at the time vital litigation decisions were being made (i.e., the expected value of a successful action, multiplied by the probability of success), and weigh this against the litigation costs. (*Whitley, [supra]*, 50 Cal.4th at [pp.] 1215-1216.)” West Park then asserted: “The analysis is simple in this case, as [West Park] never stood to make any monetary gain from the litigation.... In this case, there was never a possibility that [West Park] would recover a monetary award, or even avoid new taxation—the only possibility was that the City would be stopped from spending existing tax dollars in an unconstitutional manner.” West Park argued that “because [it] had no pecuniary interest in the outcome of the litigation, the analysis need not even reach a balancing test of the costs and benefits of litigation.”



West Park's moving papers summarized its position as follows: "Thus, the inquiry into the financial burden prong of the analysis is straightforward: [West Park] had no financial incentive to litigate, but incurred substantial financial costs in doing so. As such, the 'financial burden' element of Section 1021.5 is satisfied."

### *3. Arguments at the Hearings*

At the April 27, 2017, hearing on the motion, counsel for West Park addressed City's assertion that West Park's members were financially motivated to pursue the litigation by stating "that literally cannot be true. From a financial perspective, they either keep their homes or they receive just compensation. There's no financial difference there." West Park's counsel referred to the pleadings to support the factual assertions that "[t]here was never a goal for [West Park] in this action to stop the project" and "the goal is as stated in our objection [to the validation action]. It was to challenge the constitutionality of the financing plan, and that was done successfully." Repeating a factual assertion made in West Park's moving papers, counsel stated no monetary gain was ever possible in this case.

Counsel for City argued the ultimate objective of the homeowners who formed West Park "was to prevent the project, to prevent the freeway from going in in the first instance." Counsel argued the opposition to the validation action "was just one of their many salvos against the City and Kern County to prevent the projects in general." In other words, City claimed Park's challenge to the financing of the projects was just one avenue to the ultimate objective of preventing a freeway going through their neighborhood. Counsel for City referred to West Park's articles of incorporation to support the factual claim that the homeowners "wanted to preserve their neighborhood."

Based on the parties' arguments, the trial court asked whether it was required to "pierce the litigation" and consider more than the "bare matter that is before the Court," which matter addressed only the funding methodology for the project. The trial court's

inquiry focused on the fundamental difference between the approaches taken by the parties. Under City's approach, the court "should look beyond just the pleadings of the case and evaluate what the real objective was." In contrast, West Park argued the inquiry into goals should be limited to the litigation itself and cited *Marine Forests Society v. California Coastal Commission* (2008) 160 Cal.App.4th 867. In that case, the court referred to the plaintiff's complaint to support its conclusion that the plaintiff's "primary objective was to preserve the artificial reef," noting the plaintiff has raised every conceivable theory to prevent the reef's removal. (*Id.* at p. 876.)

During the hearing, counsel for City referred to news articles, Facebook postings and materials obtained from West Park's Web site, some of which were submitted by City with its opposition and some of which were brought to the hearing. The trial court continued the hearing until May 12, 2017, and gave West Park an opportunity to address the new materials.

At the continued hearing, counsel for West Park argued the cases discussing financial burden focus strictly on the litigation objectives and argued "[t]he fact that one would prefer to stop the project, it has nothing to do with the financial incentive." Counsel for City again argued the court should look outside the litigation itself to the underlying objective of the litigation. He also argued the material presented showed West Park opposed the financing plan before the validation action was filed and opposed the validation action to defeat the project going through their home or their neighborhood. He argued the project would devalue the homes that remained and required those owning condemned property to struggle in getting what they regarded as fair compensation.

#### 4. *Trial Court's Decision*

After hearing the arguments, the trial court took the matter under submission. Its May 17, 2017, minute order denied City's request to conduct discovery and sustained

West Park's objections to City's evidence, which included copies of West Park's articles of incorporation, screen shots from West Park's Facebook page and another source, and the news articles submitted to support City's sur-reply. The minute order stated the court found West Park "to be the prevailing party for purposes of analyzing the application of ... section 1021.5." It made no mention of the other elements of section 1021.5.

As to the amount of the award, the minute order stated: "The Court finds that the lodestar amount of \$98,867.50 times a multiplier of 1.5, produces an[] acceptable and proper amount of attorney's fees of \$163,136.00." West Park's counsel was directed to prepare an order for the court's signature. That order did not address the elements of section 1021.5. The trial court signed and filed the order on May 30, 2017.

#### 5. *Objections to West Park's Evidence*

City contends the trial court abused its discretion by sustaining West Park's objections to its affidavits and materials submitted with its opposition and sur-reply. West Park objected to attorney affidavits supporting City's opposition and its sur-reply. West Park argued (1) the affidavits did not supply the necessary foundation or authentication for the purported evidence and (2) the documents contained multiple layers of hearsay.

The attorney affidavits provide few facts authenticating the attached documents (Evid. Code, §§ 1400 [authentication of writing], 1401 [authentication required]) or explaining the basis of the attorney's personal knowledge about those documents (Evid. Code, § 702 [personal knowledge of witness]). For example, the attorney affidavit of February 2017 states the affidavit is "based on my own personal knowledge of the matters set forth herein" and states one of the exhibits "is a true and correct copy of the Articles of Incorporation" of West Park. The affidavit does not state the attorney witnessed the execution of the articles of incorporation. (See Evid. Code, § 1413 ["writing may be authenticated by anyone who saw the writing made or executed"].)

Also, the articles of incorporation are not self-authenticating as the copy is not certified by an employee of the Secretary of State's office. (See Evid. Code, §§ 1451, 1452.) The fact that the copy bears a "filed" stamp is not sufficient because there is no "signature, affixed in his official capacity, of" an employee of the Secretary of State's office. (Evid. Code, § 1453.)

In view of the absence of factual statements providing the foundation for the attorney's personal knowledge that the documents attached to each of the affidavits were true and correct copies, we need not discuss the details of each document separately. The trial court's decision to sustain the objections to those documents can be upheld based on the lack of foundation.

#### 6. *City's Request for Discovery*

City's opposition to the motion for attorney fees stated that, to the extent the trial court believed West Park had carried its burden of proof as to its lack of financial incentives, "the Court should allow the Parties to conduct limited discovery in order to investigate [West Park] and its membership and their financial interest in the litigation." The trial court denied this contingent request.

We conclude the trial court did not abuse its discretion when it denied City's request to conduct discovery. City has cited no authority showing a trial court has a legal obligation to allow discovery once the court has determined the moving party has established the elements set forth in section 1021.5. A prompt, specific attempt to conduct discovery is required before a denial will constitute an abuse of discretion. (See *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 235–236.) Here, City did not propound any written discovery or notice any depositions. Also, City did not move to continue the hearing on the motion for attorney fees on the ground it needed time to conduct discovery. In these circumstances, there was no abuse of discretion in denying City's request.

## 7. *Legal Standards Applied*

Having resolved City’s claims of error relating to the evidence and discovery, we turn to the first step of our abuse of discretion analysis—whether the trial court applied the wrong legal standards in deciding the financial burden element of section 1021.5. Many of those standards are set forth in part II.B.1., *ante* (Legal Principles).

Another legal principle is relevant to West Park’s contention on appeal that “*financial* incentive or lack thereof is not a factual question, but rather a question of the relief available in a validation action.” Restating this argument, West Park asserts “the question of [West Park’s] alleged financial interest in the litigation is a legal question regarding the relief available in a validation action, as opposed to a factual issue.” West Park’s characterization of the issue of financial interest, incentive or stake as a legal question, to be resolved by analyzing the pleadings and the relief that could be obtained, explains why West Park presented no evidence about itself, the economic interests of controlling or affiliated individuals, or how the results or potential benefits achieved in the validation action might have financially benefited those individuals.

West Park’s characterization of the ultimate financial burden issue as a legal question directly contradicts our decision in *Children & Families Com. of Fresno County v. Brown* (2014) 228 Cal.App.4th 45, where we concluded “[t]he financial burden element of section 1021.5 requires a determination of the cost of the litigation relative to its value to the [successful litigant]. *This is not a question of law.*” (*Id.* at p. 58, italics added.) Consistent with this general principle, one court has held the absence of a potential monetary recovery does not establish, as a matter of law, that there was an insufficient financial incentive to justify litigation in economic terms. (*People v. Investco Management & Development LLC* (2018) 22 Cal.App.5th 443, 465.) An evaluation of the evidence, to resolve the factual questions presented by the financial burden element of section 1021.5, requires the trial court to realistically assess the litigation, the results that might be achieved in court, and the consequences of those results on the financial

interests of the litigants. (See *Baggett v. Gates*, *supra*, 32 Cal.3d at p. 142.) An analysis that stops short of evaluating the ultimate impact of the litigation outside the courtroom does not realistically assess the litigation from a practical perspective. Therefore, West Park's approach to the financial burden element is too narrow in its inquiry and is contrary to principles established by California case law.

Whether the trial court adopted this erroneous approach to the financial burden element is a separate question. The trial court did not provide an oral or written analysis of the financial burden element. Under the applicable principle of appellate review, we presume the trial court's order was correct and indulge all reasonable intendments and presumptions in favor of the order. (E.g., *Heron Bay Homeowners Assn. v. City of San Leandro*, *supra*, 19 Cal.App.5th at p. 389 [implied findings on the financial burden element].) The fact West Park argued for a wrong legal standard and the trial court listed irrelevance as one of the grounds for sustaining City's evidentiary objections does not provide a sufficient basis for overcoming the presumption. Therefore, we conclude City has failed to show the trial court abused its discretion by applying the wrong legal standards in its evaluation of the financial burden element.

#### 8. *Sufficiency of the Evidence and Range of Discretion*

Next, we consider whether the evidence in the record was sufficient to provide a reasonable basis of the trial court's implied determination that "the expected value of the litigant's own monetary reward [did not] exceed[] by a substantial margin the actual litigation costs." (Whitley, *supra*, 50 Cal.4th at p. 1216.) If so, the trial court's determination would fall within the range of its discretion and the entitlement to attorney fees under section 1021.5 would be affirmed. (See pt. I.B., *ante*.)

Information about West Park and the individuals behind it is available in the corporation's name and in the evidence included in the administrative record. The corporate name refers to homeowners and friends. The administrative record, which

includes minutes and other materials related to meetings of the City Council identifies persons who acted on behalf of the corporation and describes the positions taken on the corporation's behalf.<sup>3</sup> From this evidence, the trial court reasonably could find the individuals whose personal financial interests were being furthered by West Park were the owners of homes and businesses whose lots would be condemned or otherwise impacted by the completion of Alternative B. Therefore, we conclude such an implied finding of fact was made by the trial court to support its determination that, when balancing the personal interests or financial stake against the cost of litigation, the financial burden of the litigation on West Park justified an award of attorney fees.

Having identified in general terms the financial interests of the individuals behind West Park, we presume the trial court considered and made an implied determination of the expected value of the monetary benefits that those individuals would realize by succeeding in the litigation. Based on the contents of the administrative record and facts and circumstances surrounding the defense of the validation action,<sup>4</sup> the trial court reasonably could find the probability of stopping the project, by invalidating the entire financing plan, multiplied by the probability of attaining a judgment invalidating the plan, was very low. Therefore, any expected monetary benefits that might have been realized

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<sup>3</sup> Minutes from the meetings of the City Council identified Amy Richardson as the chairman of West Park and Tim Stonelake as a person speaking on behalf of West Park. One of the concerns raised by Richardson was the loss of business caused by the construction of Alternative B. Richardson's comment about the loss of business leads us to consider the evidence about Alternative B's impact on business interests. That evidence includes the materials addressing the rights of way needed for Alternative B. The materials refer to 15 partial acquisitions and 36 full acquisitions of commercial or industrial parcels. Thus, it was reasonable for the trial court to find West Park was supported by both homeowners and businesses.

<sup>4</sup> We note the trial court was familiar with all of the proceedings in the validation action and with the evidence presented. Consequently, it was in a much better position than an appellate court to determine a variety of questions raised by a motion for attorney fees under section 1021.5, including the probabilities relevant to calculating an expected value. (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 991.)

by stopping the project were so remote that the expected monetary value of stopping the project was slight and did not exceed by a substantial margin the actual litigation costs. (See *Whitley, supra*, 50 Cal.4th at p. 1216.) Similarly, the court reasonably could find the expected monetary value of *delaying* the start or completion of Alternative B was slight. When these slight expected financial benefits are combined with the legal impossibility of recovering money and the extreme unlikelihood of avoiding future expenses (such as taxes) by opposing a validation action, we are unable to conclude the trial court's determination implied determination of the expected monetary benefits fell outside the range of its discretion. In short, even without detailed, personalized information about the financial interests, incentives or stakes of the individuals affiliated with West Park in the litigation, the court had a reasonable basis for determining the prospect of furthering those financial interests by opposing the validation action did not exceed by a substantial margin the actual costs of litigation.

Therefore, the trial court's implied determination that the financial burden of private enforcement justified an award of attorney fees did not constitute an abuse of discretion. City has not demonstrated error as to either of the two challenged elements necessary to an award of attorney fees under section 1021.5. Accordingly, the decision to award attorney fees will be upheld.

### III. AMOUNT OF THE AWARD

#### A. Partial Success

City contends the trial court abused its discretion by failing to significantly reduce the lodestar amount to account for West Park's limited success. California courts have recognized that where a party is successful on some claims and not on others, the fact the party did not prevail on some claims *is a factor* to be considered in determining the amount of the fees awarded. (*Lyons, supra*, 136 Cal.App.4th at p. 1345.) California



courts have not adopted a rule of law stating that partial success *requires* a reduction of the fees awarded.

Here, the question of limited success on one theory was argued to the trial court and there is no indication in the record that the court failed to consider the extent of West Park's success as a factor in determining the amount of the fees. Thus, the record does not establish the trial court abused its discretion by failing to consider a factor relevant to the ultimate determination of the amount of fees. Furthermore, the unsuccessful defenses to the validation action were not discrete and unrelated to the successful theory, pursued in bad faith, or pursued incompetently. (See *City of Sacramento v. Drew*, *supra*, 207 Cal.App.3d at p. 1303.) Therefore, the trial court acted within the range of its discretion when it decided not to reduce the lodestar amount because of the unsuccessful theories. While a court has discretion to reduce fees awarded under section 1021.5 based on degree of success, it is, of course, not required to do so. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897.)

B. Block Billing

City contends the lodestar amount—specifically, the reasonable hours component of the lodestar calculation—should be reduced because West Park's attorneys entered their time in blocks, which made it impossible to break down the hours on a task-by-task basis between the successful and unsuccessful arguments. As we have rejected the argument that the trial court abused its discretion by failing to reduce the number of hours attributable to the unsuccessful defenses raised by West Park, it follows that the argument related to block billing also fails.<sup>5</sup>

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<sup>5</sup> We note that block billing “is not objectionable ‘per se,’” but trial courts retain wide discretion to penalize block billing when the practice prevents them (1) from discerning which tasks are compensable and which are not or (2) from determining whether the hours for a specific task were incurred reasonably. (See *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830; *Christian Research Institute v. Alnor* (2008)

C. Multiplier

Trial courts determining whether to apply a multiplier to the lodestar amount should consider all relevant factors, including: “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award.” (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132.) There is no hard-and-fast rule limiting the factors that may be considered and relied upon to justify an increase or decrease in the lodestar calculation. Accordingly, whether to enhance or reduce a lodestar calculation is entrusted to a trial court’s sound discretion. (*Center for Biological Diversity v. County of San Bernardino, supra*, 185 Cal.App.4th at p. 901.) This deference is reflected in our Supreme Court’s statement that the calculation of a fee enhancement is a highly specific matter best left to the discretion of the trial court. (*Graham v. DaimlerChrysler Corp., supra*, 34 Cal.4th at p. 581.)

Here, City argues the trial court abused its discretion by applying a multiplier in the absence of a contingency fee agreement. We reject this argument because it fails to account for the risk that the corporation would not be able to fulfill its obligation to pay the hourly fees billed. The invoices in the record show this risk of nonpayment and the actual delays in payment experienced. Only a few small payments have been made since the payment of the September 2014 invoice and the outstanding balance shown on the last invoice (dated October 1, 2016) was \$56,049.37.<sup>6</sup> Therefore, we reject the argument that a contingency fee agreement is necessary to applying an enhancement to the lodestar calculation. A realistic assessment of the risk of nonpayment and delays in payment requires more than simply determining whether there is a contingency fee agreement. As

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165 Cal.App.4th 1315, 1324–1325; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689.)

<sup>6</sup> At the time of the May 2017 hearing, the payment of some of the invoice amounts had been delayed for over two and half years.

stated in *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, “any one of [the numerous] factors may be responsible for enhancing or reducing the lodestar.” (*Id.* at p. 947.) Here, the novelty and difficulty of the questions involved—which resulted in a published opinion by this court—and the trial court’s evaluation of the skill displayed in presenting the questions support the award of an enhancement of the lodestar amount. Accordingly, the trial court did not abuse its discretion when it applied a multiplier of 1.5 despite the absence of a contingency fee agreement.

In addition, the fact that the fee award will be paid by the taxpayers is a factor relevant to the adjustment of the lodestar calculation. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) The payment of a litigant’s attorney fees by a public entity, standing alone, does not justify a complete denial of an upward lodestar adjustment. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 400.) We conclude that when a public entity proposes the unconstitutional use of tens of millions of revenues derived from taxes, the fact the upward adjustment in the fee award ultimately will be funded by taxpayers does not constitute an abuse of discretion under the deferential standard applied to such enhancements. (See *Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at p. 581.)

### **DISPOSITION**

The order granting West Park’s motion for attorney fees is affirmed. West Park shall recover its costs on appeal.

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FRANSON, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.